JUDGMENT NON OBSTANTE VEREDICTO

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ONE who undertakes a discourse upon this subject may be pardoned a temptation to apologize for attempting a somewhat superfluous activity. In one respect, too little need be said to make the effort worth-while. All that is necessary for an understanding of the principles involved in a judgment non obstante veredicto, confined to its original and conventional field, may be found in one or two pages of any standard text on common law pleading. On the other hand, so much has been written about it as expanded beyond the scope of its original application that there is little room left for originality in any further discussion. However, a review of the subject in the light of the West Virginia law may be justified on two considerations. First, the West Virginia courts have had no little difficulty in dealing with the practice and the local decisions have by no means been harmonious. Secondly, it may be profitable to inquire into the practice in other jurisdictions for the purpose of determining to what extent it is practicable and desirable to seek a change in the local practice by statute or otherwise.

The principle upon which a judgment notwithstanding verdict was based at the original common law is comparatively simple. Essentially, it is merely one of numerous applications of the fundamental principle that a judgment, to be valid, must be warranted, not only by the result of some fact-finding operation, e.g., a verdict or a default, but also by the whole record of the case, particularly the record as embodied in the pleadings. In other words, the fact that a verdict has been found in favor of a party does not entitle him to judgment unless the record behind the verdict is sufficient to sustain a judgment in his favor. On the other hand, a record which is insufficient to warrant a judgment in favor of the party winning the verdict may be in such a state as to entitle the other party to a judgment based on the record alone.

However, a judgment non obstante is not proper in all instances where a defective record prevents a party from having judgment on a verdict. The defect in the record, to prevail against the verdict, must of course be substantial. A mere formal defect would not interfere with entering judgment on the verdict. Furthermore, even in the case of substantial defects, there was only one instance under

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the original common law where judgment *non obstante* was proper. Originally, it could be entered only in favor of a plaintiff, and, even in favor of a plaintiff, only in one situation where a defect in the record precluded entry of judgment for the defendant based on a verdict in his favor. That situation was where a defendant interposed a plea in confession and avoidance and the matter pleaded in avoidance was insufficient and immaterial.¹

The basis on which judgment was rendered for the plaintiff in such a situation offers a nice illustration of the technical logic and symmetry of common law pleading. A verdict for the defendant based upon an issue arising from such a plea, of course, can avail him nothing. The issue is immaterial and a decision of the facts in his favor determines nothing in respect to the merits of the case. On the other hand, since the plea is one in confession and avoidance, it does, although it fails to avoid anything, confess the allegations of the declaration, thus entitling the plaintiff to judgment on the allegations of his declaration taken for confessed. In fact, it is said that the judgment is merely an instance of judgment by confession.²

¹ Andrews, *Stephen's Pleading* (1901) 231; 4 Minor, *Institutes* (1878), 770-772. The practice is nicely illustrated in Mason v. Harper's Ferry Bridge Co., 28 W. Va. 639 (1886). In this case the defendant pleaded *nil debet* and a plea in confession and avoidance which was "bad and immaterial."²

² See same citations. The fact that the judgment is based on a confession of the declaration is a justification of the requirement that a plea in confession and avoidance must give color.
Since the judgment is based on a confession, it is obvious that it would not be warranted in every case where a defendant interposes a plea which raises an immaterial issue. The plea must not only raise an immaterial issue but it must, by way of giving implied color to the allegations in the declaration, confess. Hence an immaterial traverse (as where a defendant traverses the time or the place when or where an ordinary assault and battery is alleged to have been committed, and the jury finds in his favor on the issue raised by the plea), since it does not confess the allegations in the declaration, can furnish no basis for a judgment non obstante in favor of the plaintiff. A motion for a repleader is the proper remedy in such a situation.\footnote{Andrews, Stephen’s Pleading 231-2.}

It has been said by an eminent authority that, even where a verdict has been found for the plaintiff on an immaterial issue arising from a plea in confession and avoidance, his proper judgment is a judgment non obstante, and not a judgment based on the verdict; the assumption being, of course, that the verdict, deciding only an immaterial matter, is devoid of any efficacy whatever, and therefore cannot serve as a basis of judgment for either party to the controversy.\footnote{“Sometimes it may be expedient for the plaintiff to move for judgment non obstante, etc., even though the verdict be in his own favor; for, if in such a case as above described, he take judgment as upon the verdict, it seems that such judgment would be erroneous, and that the only safe course is to take it as upon confession.” Andrews, Stephen’s Pleading 231.} On the other hand, another high authority has expressed doubts as to the necessity of the plaintiff’s resorting to a judgment non obstante when the verdict is in his favor.\footnote{“It may be sometimes expedient, it is said, for the party who has obtained the verdict, himself to move for judgment non obstante, &c.; for a judgment upon a verdict, in such a case as above described, would be erroneous, although it is not easy to conceive of a case which would illustrate or exemplify this last observation. The cases which are cited by Mr. Stephen for that purpose, (Wilkes v. Broadbent, 1 Wils. 63; and Dighton v. Bartholomew, 2 Cro. (Eliz.) 778) certainly throw no light upon the point.” 4 Minor, Institutes 771.} Although it may be more logical for the plaintiff to take a judgment non obstante in such a case, it may be doubted that a judgment based on the verdict should be subject to reversal. It would seem technical to reverse a judgment for the plaintiff based on the verdict in his favor merely because he failed to conform to the logic of procedure, when he would have been entitled absolutely, under the same facts and circumstances, to an equally efficacious judgment on a different application of the facts and circumstances. Ordinarily, a judgment war-
ranted by the facts and circumstances of a case is not reversed merely because it is based on a wrong theory.

It follows from what has been said that, if the true theory on which a judgment *non obstante* should be based is observed, it would not be possible to enter such a judgment for a defendant contrary to a verdict for the plaintiff based on an insufficient declaration, since nothing in the declaration would amount to a confession of the defendant’s plea. The defendant’s traditional remedy in such a case is a motion in arrest of judgment. Consequently, under the English practice, based on strict legal theory, a judgment *non obstante* can be rendered only in favor of a plaintiff.

Notwithstanding the limitations imposed by the theory upon which the judgment *non obstante* is based, as has happened in many instances in the law, the practice has expanded beyond the limits prescribed by the principles which originally justified its use. It is now held in many jurisdictions that a defendant is entitled to judgment *non obstante* when a verdict is found for a plaintiff on a declaration which states no cause of action. Of course, in such a situation, the defendant could still move in arrest of judgment and the

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6 Id. at page 772.
7 Ibid.; 30 AM. Jur. (1940) 844.
8 MINOR, INSTITUTES 722. "A motion for a judgment notwithstanding the verdict is now generally available to all parties, either as a result of judicial relaxation of the common-law rule confining the remedy to the plaintiff, or as a result of express statutory provisions operating, not only as an adoption of the common-law motion by the plaintiff for judgment notwithstanding the verdict, but also as an extension of this remedy to the defendant as a substitute for the common-law motion in arrest of judgment." 30 AM. Jur. (1940) 844-5.

In Shafer v. Security Trust Co., 82 W. Va. 618, 97 S. E. 290 (1918), propriety of the motion for judgment *non obstante* on the part of a defendant is recognized, but the motion was overruled because it was based merely on misjoinder of causes of action. In such a case, of course, the declaration does not fail to state a cause of action but, in a sense, states too many causes of action. The court says in the syllabus. "It may be applied to defeat a judgment upon a verdict predicated upon a declaration that does not state a cause of action entitling the plaintiff to recover. But in no event can it serve the purpose of a demurrer to reach a merely formally defective declaration, which but for the informality or irregularity states a good cause of action."

Correctness of the court’s statement in the opinion that a new trial should have been granted in this case may be doubted. Misjoinder of causes is not trial error, but error in the record. At the common law, the remedy was a motion in arrest of judgment. It is not aided by verdict, because the evidence can supply nothing to remedy a misjoinder of causes. It is, however, cured by the statute of jeofails unless a demurrer, saving the point, has been interposed. See Malsby v. Lanark Co., 55 W Va. 484, 47 S. E. 359 (1904). In the instant case a demurrer to the declaration had been interposed and overruled. Hence the defendant should have been entitled to move in arrest of judgment.
result is that he has two alternative remedies. One limitation, however, remains. It is still essential in most jurisdictions, in the absence of a statute, that the record itself furnish a basis for the judgment _non obstante_, and it cannot be based merely on insufficiency of the evidence to sustain the verdict.9

The courts have been restive under this limitation. They have been subjected to a natural temptation to resort to a judgment _non obstante_ when the verdict (usually for the plaintiff) is not supported by the evidence in order to avoid the undesirable consequences of granting a new trial. Particularly is this true when the court has refused to direct a verdict at the request of a party, the jury has found a verdict for the other party, and the court, after the jury has been discharged, on mature deliberation, decides that it erred in refusing the request. Both the trial courts and the Supreme Court of Appeals of this state have repeatedly surrendered to this temptation.

Two reasons may be urged why rendering a judgment _non obstante_ because the verdict is not supported by the evidence is illegal. (1) Such a procedure is contrary to the common law. (2) Such a procedure deprives the losing party of his right to a jury trial guaranteed by the constitutions and hence not only violates the common law rules of practice, but also deprives him of a constitutional right. The first objection, of course, can be obviated by statute; but the second objection, if valid, cannot. If the second objection is valid, a statute undertaking to validate the procedure would be unconstitutional.

Various devices, one long-established under the English common law and others prescribed by statutes in different states, have been resorted to for the purpose of permitting the jury in a doubtful case to return a verdict and at the same time to reserve in the court power to render a judgment contrary to the verdict. The object, of course, is to give the court sufficient time for deliberation and prevent a hasty decision which may lead to a reversal and its undesirable consequences; it being recognized that, on a motion to direct or presentation of a peremptory instruction for the same purpose, the court, in a doubtful case, cannot take sufficient time for a reliable decision.

9 "It is well settled that in the absence of a statute the motion cannot be made to search the evidence to see if it is legally sufficient, eleven states having refused to extend it because of lack of statutory authority." (1935) 34 Mont. L. Rev. 93-4. The states included in the eleven are Arizona, Arkansas, Illinois, Iowa, Kentucky, Oklahoma, Oregon, North Carolina, Tennessee, Utah and West Virginia.
Under the English common law practice (which has prevailed at least since the early years of the eighteenth century, and therefore prior to adoption of the Federal Constitution),\(^\text{10}\) the case is submitted to the jury for a verdict, but the court reserves power to render a judgment contrary to the verdict if it later decides that the evidence supporting the verdict is so deficient that, as a matter of law, the verdict cannot stand. The reservation of power to render a judgment *non obstante* is expressly called to the attention of the jury and the jury expressly gives its consent to exercise of the power.\(^\text{11}\) In reality, this amounts to a delegation by the jury of its powers and functions to the court. The verdict, to the extent that it is a verdict, may be described as a sort of hybrid alternative verdict, one alternative being found by the jury and the other, if the court decides that the jury’s finding cannot legally stand, being found by the court. Since the court exercises the alternative, of course the final decision of the case rests with the court. Nevertheless, since the court acts under express authority from the jury, the final result is supposed to be based on the verdict of the jury and the parties are supposed to have had a proper jury trial.

The courts in the United States, at least until a comparatively late date, seem to have been unaware of this English common law practice.\(^\text{12}\) At any rate, instead of resorting to it, statutes have been enacted in many of the states prescribing a practice more or less similar to the common law practice for the purpose of accomplishing the same result.\(^\text{13}\) These statutes are by no means uniform and some of them fall far short of the solicitude manifested by the English practice for at least a colorable showing that the judgment of the court amounts to carrying into effect the verdict of the jury.


\(^\text{11}\) It has been argued by one commentator, but denied by others, that consent of the parties is necessary in the common law practice. See Note (1935) 21 Iowa L. Rev. 117, 124-5.

\(^\text{12}\) The court seems to have been oblivious to the practice in the year 1913, when the case of Slocum v. New York Life Insurance Co., 228 U. S. 364 (1913), hereinafter discussed, was decided.

\(^\text{13}\) The Minnesota statute, passed in 1895, is said to be the pioneer statute. See (1935) 34 Mich. L. Rev. 93, 94. At least sixteen other states are said to have adopted statutes for a similar purpose: California, Colorado, Idaho, Kansas, Louisiana, Massachusetts, Michigan, North Dakota, Pennsylvania, South Dakota, Texas, Virginia, Vermont, Washington, Wisconsin, Wyoming. *Idem.* West Virginia has no such statute.
At one extreme are statutes such as the Pennsylvania statute\(^4\) involved in the famous (or infamous) case of *Slocum v. New York Life Insurance Co.*\(^{15}\) hereinafter discussed. Under such statutes, the court is given power to render judgment contrary to the verdict without asking the jury's consent as a condition precedent, and even without notice to the jury that such a judgment may be rendered. At the opposite extreme come statutes such as the Massachusetts statute\(^6\) under which the court must inform the jury of the judgment which it may possibly enter contrary to the verdict and must have the consent of the jury to do so. Under these statutes, it is said,\(^7\) the jury, actually or in effect, finds a verdict in the alternative. The practice prescribed is substantially the same as the English common law practice hereinbefore described. Still another class of statutes, exemplified by the New York statute\(^8\) under which the

\(^{14}\) "Whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court." PA. *STATS.* (1920) § 12793.

\(^{15}\) Note 12 supra.

\(^{16}\) "When exceptions to any ruling or direction of a judge are alleged, or any question of law reserved, in the course of a trial by jury, and the circumstances are such that, if the ruling or direction at the trial was wrong, the verdict or finding ought to have been entered for a different party or for larger or smaller damages or otherwise that as was done at the trial, the justice may reserve leave, with the assent of the jury, so to enter the verdict or finding, if upon the questions of law so raised the court shall decide that it ought to have been so entered. The leave reserved, as well as the findings of the jury upon any particular questions of fact submitted to them, shall be entered in the record of the proceedings, and if upon the questions of law it shall be decided, whether by the same court or by the appellate court, that the verdict or finding ought to have been entered in accordance with the leave reserved, it shall be entered accordingly . . . . When so entered, the verdict shall have the same effect as if it had been entered at the trial." MASS. *GEN. LAWS* (1932) c. 231, §120.


\(^{18}\) "Where upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict subject to the opinion of the court. Notwithstanding that such a verdict has been rendered, the judge holding the trial term may set aside the verdict at the same term and direct judgment to be entered for either party, with like effect and in like manner as if such a direction had been given at the trial." N. Y. *CIV. PRAC. ACT* (Cahill 1931) § 461.
case of *Baltimore & Carolina Line v. Redman*, hereinafter discussed, was decided, may be classified as intermediate between the two extremes. It will be noted that, under the practice prescribed by this type of statute, although the court is not required to obtain the jury's express consent, still the jury must be directed to render its verdict subject to the opinion of the court.

All these statutes are products of state legislation, no federal statute regulating the practice ever having been enacted. So far as their constitutionality, with respect to infringing constitutional guaranties of jury trial, has been challenged in the state courts, they have, it is said, been held constitutional. Hence, as indicated by the outcry, it was with equal surprise and consternation to most members of the legal profession that, in *Slocum v. New York Life Insurance Co.*, the United States Supreme Court, by a five to four decision, held that the Pennsylvania statute hereinbefore quoted was unconstitutional as invading the right to jury trial guaranteed by the Federal Constitution.

In this case an action was brought in a federal circuit court in Pennsylvania, with jurisdiction based on diversity of citizenship, for recovery on a life insurance policy. The trial court refused a request for direction of a verdict in favor of the defendant. The jury found a verdict for the plaintiff. The circuit court of appeals, on a writ of error, decided that the trial court had committed error in refusing to direct a verdict for the defendant, the evidence being clearly insufficient to support a verdict for the plaintiff, reversed the judgment of the trial court and rendered judgment *non obstante* for the defendant, pursuing, under the conformity act, the practice prescribed by the Pennsylvania statute. The Supreme Court, although holding that the circuit court of appeals had correctly reversed the judgment of the trial court, because the trial court had clearly erred in refusing to direct a verdict for the defendant, nevertheless reversed the judgment of the circuit court of appeals because it had rendered a judgment *non obstante* in favor of the defendant instead of directing a new trial. The basis of the decision in the

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19 Note 10 supra.
20 For an analysis of the different types of statutes, see (1935) 34 Mich. L. Rev. 93, 98-9.
21 *Id.* at pages 93, 96, note 16.
22 Note 12 supra.
23 Note 14 supra.
24 The decision caused all the more surprise because the lower federal courts in Pennsylvania had theretofore held the statute constitutional. (1935) 34 Mich. L. Rev. 93, 96, note 16.
Supreme Court was that the Pennsylvania statute, if applied to
trials in the federal courts, would violate the provisions of the Fed-
eral Constitution guaranteeing the right to jury trial and providing
that "no fact tried by a jury, shall be otherwise re-examined in any
Court of the United States, than according to the rules of the com-
mon law."\textsuperscript{25} The court defines the jury trial and the methods of
review referred to in the Constitution as those existing under the
English common law at the time when the constitution was adopted,
notes the various common law methods by which a case might be
taken away from a jury or the finding of a jury reviewed at the time
when the constitution was adopted, and reaches the conclusion that
a judgment \textit{non obstante} was not one of them. Wherefore, it was
held that a statute prescribing such a practice was unconstitutional.

This decision, of course, could in no way affect or modify the
practice in the state courts, since the provisions in the Federal Con-
stitution on which it was based apply only to trials in the federal
courts. The states, through their courts, were still free to interpret
their respective statutes in the light of their own constitutions. But
it was feared, as suggested in the vigorous dissenting opinion of Mr.
Justice (later Chief Justice) Hughes, that the possibility of enact-
ing a valid statute for the purpose of establishing a more liberal
practice in the federal courts was foreclosed. Great was the com-
motion in the field of legal thought and numerous the commentar-
ies in legal periodicals.\textsuperscript{26} The American Bar Association indulged
in a futile effort to have the case reheard.\textsuperscript{27} Attention was called to
the English common law practice, which had been ignored in the op-
inion, and suggestions were made to the effect that a statute embody-
ing the features of the English practice, requiring consent of the
jury to a judgment \textit{non obstante}, might be held constitutional. But
the limitation imposed on the federal courts by \textit{Slocum v. New York
Life Insurance Co.}, continued in effect until the year 1935.

\textsuperscript{25} See Seventh Amendment to the Constitution.
\textsuperscript{26} The following citations are given for those who may desire to make a
study of the problem. Some of the commentaries were inspired by the Slocum
case; others, by the Baltimore & Carolina Line case, in which the court reaches
a result contrary to that reached in the Slocum case. \textit{(1935) 34 Mich L. Rev.}
93; Note \textit{(1935) 21 Iowa L. Rev. 117}; \textit{The Supreme Court on Judgments Non
Obstante Veredicto} \textit{(1935) 22 Va. L. Rev. 188}; Thorndyke, \textit{Trial by Jury in the
United States Courts} \textit{(1913) 26 Harvard L. Rev.} 732; Schofield, \textit{New Trials and
the Seventh Amendment, Slocum v. New York Life Insurance Company} \textit{(1913)
8 Ill. L. Rev.} 287, 381, 465; \textit{(1913) 13 Col. L. Rev.} 544. Other references will
be found in these commentaries. Also see citations in \textit{Dobie AND LADD, CASES
ON FEDERAL JURISDICTION AND PROCEDURE} \textit{(1940) 738}, note 90.
\textsuperscript{27} See Note \textit{(1935) 21 Iowa L. Rev.} 117, 123, note 35.
In that year, in *Baltimore & Carolina Line v. Redman*, the opinion in which was delivered by the same justice who delivered the majority opinion in the *Slocum* case, a statute permitting a judgment *non obstante* in a case where a directed verdict was erroneously refused was held valid. The statute involved was the New York statute, jurisdiction in the federal court here again being based on diversity of citizenship and the New York practice being applied under the conformity act. The holding in the *Baltimore & Carolina Line* case, as distinguished from the holding in the *Slocum* case, is based partly on dissimilarity between the New York and the Pennsylvania statutes, under which, respectively, the two cases were decided. However, some of the commentators consider the difference between the practices prescribed by the respective statutes so unsubstantial that they are convinced that, if the later case does not constitute a half-hearted overruling of the earlier case, at least it opens the way for such an overruling. Hope for an express overruling in the future was engendered by a suspected change in the court's attitude toward the whole question. In this respect, it may be significant to note that the court possibly instructed by the numerous commentaries following the *Slocum* decision, was aware of the English common law practice when it delivered its decision in the *Baltimore & Carolina Line* case, and hence may have felt that the practices prescribed by the various statutes were, after all, not entirely foreign to the common law practice prevailing prior to the year 1791. Furthermore, the court could not have been unaware of the great flood of criticism which followed the decision of the *Slocum* case, nor of the almost unanimous commendation of the dissenting opinion of Mr. Justice Hughes and three of his colleagues in that case.

Whether or not the *Baltimore & Carolina Line* case overruled the *Slocum* case, it certainly did open the way for enactment of a valid federal statute, similar to at least some of the state statutes, for the purpose of regulating the practice; but enactment of such a statute was forestalled by plans for adoption of rules of court, as substitutes for statutes, for the purpose of regulating procedure in the federal district courts. Among the rules finally adopted is one providing for judgment *non obstante* based on insufficiency of the evidence to sustain a verdict, and even for judgment where no verdict has been returned. Since the presumption should be that this

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28 Note 10 supra.
29 Note 18 supra.
30 Notes 18 and 14 supra.
rule embodies the latest and most enlightened wisdom, not of a single state but of the whole country, brought to bear upon the subject, it may be worth quoting in full.

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."[3]

Seemingly the framers of this rule must have assumed that the Supreme Court, by which it was to be approved and adopted, would not be troubled by any qualms such as prevailed when the Slocum case was decided. It will be noted that, in order to authorize the court to enter judgment non obstante, no consent of the jury is necessary, no question need be reserved, and not even notice to the jury that the court may render a judgment contrary to its verdict is required. As is provided in some of the state statutes, the court is given a discretion to order a new trial in lieu of rendering judgment non obstante. Also as provided in some of the state statutes, the party entitled to judgment non obstante must, in order to obtain it, make a motion for its rendition in his favor.

On the whole, disregarding formalities and looking to substance alone, it would seem that any statute or rule of court which merely authorizes the court, as does the federal rule, to render judgment non obstante, without forewarning the jury or obtaining its consent, should always have been held constitutional. It very well may be true that a statute or a rule of court is necessary to authorize such a practice, since seemingly the only recognized common law practice required consent of the jury; but it is difficult to see why the com-

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mon law, if it recognizes the practice at all, ever required consent of the jury, except as a mere formality paying lip service to the supposed essentials of jury trial. If there is anything that the jury may properly decide, it is difficult to understand how it could have authority to delegate its functions to the court and the parties still have a jury trial. The constitutional Guaranties are for the purpose of securing the rights of the parties, not any supposed rights of the jury. If a party has the right to have a jury decide his case, the jury should have no more power than the court to resort to any device that will deprive him of that right. The jury in such a case should have no power to exercise consent on behalf of a party and consent for itself is wholly immaterial. On the other hand, if there is nothing on a particular point that the jury can properly decide, of course there is nothing to take away from it by its consent or otherwise. If there is not, as a matter of law, sufficient evidence upon which the jury could properly find a verdict for a particular party, then there is nothing that it can legally do except to find a verdict for the other party. If it does not do so, the court is taking away from it none of its functions when the court disregards its verdict and enters judgment for the only party for whom a verdict could legally have been found. If, on the other hand, the court is depriving the jury of its exclusive function when it enters judgment for the proper party in such a case, it is difficult to understand why it is not doing so equally when it directs a verdict for a particular party, power to do which is now conceded to the court by the great weight of authority. A directed verdict is only a verdict in form. Substantially, it is no verdict at all. It is not based on mental processes of the jury but on those of the court. If, on this basis, the court can properly take the case away from the jury by directing it what verdict to render, why can it not with equal propriety take over a decision of the case after the jury has found an improper and illegal verdict and render judgment in accord with the only verdict which the jury could legally have found? Wherefore, if no consent on the part of the jury is necessary when a verdict is directed, why should any consent, express or implied, be necessary after the illegal verdict has been returned?

32 "When a verdict is directed in favor of one party on the ground that the evidence does not warrant a verdict for the other party, the case is said to be 'withdrawn' from the jury or 'not submitted' to the jury. The form of entering a verdict is employed, because it is the most convenient, if not the only, form of proceeding to dispose of the case according to the existing rules." Thorndyke, supra note 26, at 732, 735.
On the question of rendering a judgment *non obstante* when a directed verdict has been refused, the West Virginia cases have not been quite in harmony.

First of all, it should be noted that we have not adopted any statute or court rule for the purpose of authorizing or regulating the practice. The decisions dealing with the subject are based wholly on common law principles. In one respect, they seem to be uniform and consistent. Apparently, in every case in which a trial court has refused to direct a verdict at the behest of a party (usually the defendant) and the jury has found a verdict for the other party, the supreme court of appeals has consistently denied any power in the trial court to render a judgment *non obstante*, repeatedly referring to the orthodox common law principle that such a judgment cannot be based on the evidence but must be based on the record (pleadings) in the case. Inconsistency and confusion in the

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33 The following statute has been cited by Judge Brannan as authorizing the Supreme Court to enter a judgment *non obstante* when a case is reversed because the trial court erroneously refused to direct a verdict:

"The supreme court of appeals shall affirm the judgment, or order, if there be no error therein, and reverse the same in whole or in part, if erroneous, and enter such judgment, decree or order as the court whose error is sought to be corrected ought to have entered . . . ." W. Va. Code (1931) c. 58, art. 5, §25.

In Soward v. American Car Co., 66 W. Va. 266, 66 S. E. 329 (1909), Judge Brannan, referring to this statute says: "Under the very letter of Code, chapter 135, section 26, this Court must render such judgment as the court below should have rendered. What judgment should it have given? It should have directed a verdict for defendant, and rendered judgment for it, and not having done so, ought to have corrected its error by setting aside the verdict and giving judgment for defendant."

This reasoning would be valid if the supreme court had recognized power in the trial courts to render judgment *non obstante* based on the evidence. As hereinafter noted, it has consistently denied such power to the trial courts. Judge Brannon seems to have lost sight of this fact. The cases cited in the following note firmly establish that all that the trial court in such a case can do is to direct a verdict, when the evidence so warrants, or set aside a verdict not warranted by the evidence and grant a new trial. Therefore, if the Supreme Court, on reversal, should enter such judgment as the trial court should have entered, all that it can do is to enter an order granting a new trial. It is an impossibility for either the trial court or the Supreme Court to direct a verdict after the jury has been discharged.

decisions will be found only when the question has arisen whether
the appellate court has authority to exercise this power which it has
denied to the trial courts. Specifically, the question has arisen when
the trial court has refused a directed verdict at the request of a party
(usually the defendant), the jury has found a verdict for the other
party, the trial court has entered judgment on the verdict, and, on
a writ of error, the appellate court has reversed the judgment and
set aside the verdict on the ground that the verdict is contrary to
the evidence. The question then has arisen whether the appellate
court should remand the case for a new trial or should enter judg-
ment non obstante.

Apparently, it never occurred to the supreme court that there
was anything to do with the case in such a situation but to remand
it for a new trial until the year 1903, when it for the first time ren-
dered judgment contrary to the verdict without remanding the case
for a new trial.\textsuperscript{26} The protracted controversy among the judges and
the earlier vacillating decisions which ensued will be found reviewed
elsewhere in this publication.\textsuperscript{25} The later decisions will be discussed
hereinafter.

It may be surmised that part (if not the whole) of the indecision
arose from the fact that the supreme court generally failed to recog-
nize that, when it renders judgment contrary to the verdict in such
circumstances, it is doing nothing else than rendering judgment non obstante based on the evidence, a procedure which it had consistent-
ly and uniformly denied to the trial courts because it was contrary
to common law principles, a reason which would equally disqualify
trial courts and appellate courts from indulging in such a practice.
Apparently, only in a few of the earlier cases did the supreme court
recognize the primary principle involved and, when it refused to
enter judgment contrary to the verdict. did so because such a judgment
cannot be based on the evidence, thus applying to itself the
same rule which it has always applied to the trial courts.\textsuperscript{37} In most


\textsuperscript{26} See Prickett v. Frum, 101 W. Va. 217, 224, 132 S. E. 501 (1926); Zinn
Glass Co., 81 W. Va. 39, 93 S. E. 958 (1917), the supreme court denied power
in a circuit court, on a writ of error from an intermediate court, to render judg-
ment non obstante based on the evidence.
of the earlier decisions this principle seems to have been forgotten or ignored and judgment non obstante was entered or a new trial was ordered without any reference to it.

Finally, in 1922, in Dunbar Tire & Rubber Co. v. Crissey, the court seems to have been confronted with a definite recognition of the conflict in its prior decisions and the necessity of settling the conflict. It did this by citing and expressly overruling all the cases in which it had theretofore entered judgment without remanding the case for a new trial. The cases overruled were expressly disapproved on the ground that the supreme court had no power to render judgment non obstante based on the weight of the evidence.

Due to the emphatic manner in which these cases were overruled, and the definite recognition of the principle on which they were disapproved, it would seem that the practice might have been considered definitely settled for the future. Nevertheless, in a few cases decided not long after the Dunbar Tire & Rubber Company case, the court, without referring to that case or the principle upon which it is based, reverted to the practice disapproved by it and entered judgment above without remanding for a new trial. However, any renewed period of vacillation was short-lived. Possibly actuated by a realization of sporadic departures from the Dunbar Tire and Rubber Company case, the court in Clise v. Prunty approved the former case and again elaborately cited and disapproved the cases which it had overruled. Since then the court has not departed from its holding in these two cases, although there is a dissenting opinion in the latest case dealing with the subject, an indication that the court is still divided on considerations which caused the conflict in the earlier decisions.

Whatever may be the expediency of the rule which seems finally to have been adopted by the West Virginia court, it would seem to be in line with the decisions of other states. The question involved here is not the question involved in the Slocum case. The decision in that case did not deal primarily with the common law practice but with a statute, presumably enacted for the purpose of changing or supplementing the common law. The question was whether the statute was constitutional. As heretofore noted, it has generally

38 92 W. Va. 419, 114 S. E. 804 (1922).
39 See De Campi v. Logan, 95 W. Va. 84, 120 S. E. 915 (1923).
40 112 W. Va. 181, 163 S. E. 864 (1932).
42 See note 9 supra.
been held that, at common law, a judgment *non obstante* based on the evidence, unless consent of the jury thereto has been obtained in advance, is improper. If this common law requirement is not observed, then a statute (or rule of court) is necessary to validate the practice. There is no such statute or rule of court in this state, and, presumably, in none of the adjudicated cases was consent of the jury to entry of the judgment obtained in conformity with the common law practice. It will be interesting to see whether, if in some future case the trial court obtains consent of the jury as required by the common law practice, a judgment *non obstante* based on the evidence will be held valid.

If a statute should be enacted or a rule of court promulgated in this state for the purpose of regulating the practice, the question of constitutionality may arise. As heretofore noted, such statutes appear to have been uniformly held constitutional in other states, not only by the state courts but also by the lower federal courts until the decision of the *Slocum* case. However, our constitution contains a provision which occurs elsewhere only in the Federal Constitution and the constitutions of a very few states, to the effect that a fact tried by a jury shall not be re-examined except according to the rules of the common law.43 One of the best arguments to the effect that such a provision interposes no constitutional obstacle will be found in the dissenting opinion of Mr. Justice Hughes in the *Slocum* case. The argument is that the jury, in rendering a verdict which, as a matter of law, is so contrary to the evidence that a verdict for the other party should have been directed, has not legitimately tried any fact; that, since an uncontrolled decision of the case should never have been submitted to it, there was no fact for it to try—nothing upon which it could properly exercise any ratiocinative function; and therefore a judgment contrary to the verdict is not, substantially, the result of a re-examination of anything legitimately decided by the jury.

Aside from the question whether the practice of entering a judgment *non obstante* based on the evidence is legal, or can be made legal by statute or a rule of court, is it as a matter of policy commendable. Would it be desirable to enact a statute or to adopt a court rule in this state for the purpose of authorizing it?

The fact that there has been an abiding temptation, both in the trial courts and in the supreme court of this state, to resort to the

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practice when the trial court, upon due deliberation, or the supreme court upon a writ of error, has decided that a directed verdict was improperly refused, manifests an instinctive feeling that it subserves the ends of justice. On the impulse, it seems the most direct and obvious method of correcting the error in permitting the jury to return an erroneous verdict. Allowing the judgment *non obstante* looks like doing merely what the court should have done when requested to direct the verdict. Yet those who oppose the practice insist that it is not quite the same.

Attention is called to the fact that, when the plaintiff is the losing party (as he usually is) by entry of the judgment, he loses the opportunity, which he would otherwise have, of taking a nonsuit for the purpose of suing again in another action. Under our practice, this would undoubtedly be true. If a motion for a directed verdict is sustained, a nonsuit may be taken before the verdict is directed; but it would be too late to take a nonsuit at the time when a judgment *non obstante* is entered, whether in the trial court or in the supreme court, since a nonsuit must be taken before the jury retires. Of course, if the motion to direct should be overruled, the plaintiff would be justified in assuming that his case was to be finally decided by the jury and would have no occasion to take a nonsuit. Furthermore, it is said that the plaintiff, after a motion to direct has been sustained but before a verdict has actually been directed against him, might ask leave to reopen his case and introduce further evidence to strengthen it, something which of course he could not do after the jury had been discharged.

In addition to these considerations which, it is urged, demonstrate that the losing party may be in a less advantageous position at the time when a judgment *non obstante* is entered than he would have been if the motion to direct had been sustained, other considerations are urged why it is unfair to the losing party to enter a judgment *non obstante* against him in lieu of ordering a new trial. If a new trial is ordered, he may, it is said, be able to produce additional evidence which would justify a verdict in his favor. Finally, it is insisted that the practice is discriminatory; that it offers the party

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46 W. VA. CODE (1931) c. 56, art. 6, §25.
48 *Idem.*
against whom the motion to direct is made only one chance to win, while the other party has three. How much weight such objections should have may be somewhat speculative.

As to interference with an opportunity to take a nonsuit, a counter argument may be that the common law has overindulged the plaintiff in this respect; that when he has started an action and subjected the defendant to most of the burdens of the litigation, he ought to be compelled to litigate it to a final conclusion, unless he can offer some valid excuse for quitting; that the modern tendency is to place a curb on the plaintiff's unlimited right to take a nonsuit. He can get no legitimate advantage out of a nonsuit unless he is able to produce additional evidence at a trial in a subsequent action. If there is such evidence and he is aware of it at the time when the motion to direct is made, but does not then have it available, there are two ways in which he may avail himself of an opportunity to take advantage of it and avoid the risk of submitting his case to the jury on a doubtful measure of proof. He may first seek a continuance and, if he fails in that, may take a nonsuit before the case is submitted to the jury. If he is aware of no such evidence at the time, it may be doubted whether he should later be allowed the benefit of a new trial, merely because it is too late to take a nonsuit, in order to permit him to go on a fishing expedition.

The benefit which a party might derive from an opportunity to reopen his case for the introduction of additional evidence after a motion to direct has been sustained would perhaps in most cases be rather precarious, for the reason that, at that time, he usually would not have available any further evidence, even if he knew of its existence. A continuance or a new trial would generally be necessary.

49 "The rendition of a judgment by the appellate court, in such a state of the case, works another injury in a legal sense, by putting the parties on an unequal footing. It enables the defendant to have three chances, one before the court and two before the jury, while the plaintiff has but one, a chance before the court. It allows the defendant to make a demurrer to the evidence against the plaintiff, for his own benefit, without subjecting himself to the operation of a demurrer. Upon the Court's refusing his motion, he has a chance of a verdict in his favor. If he fails to get that, he comes up to the appellate court, on the issue of law, and has final judgment. If the verdict be for the defendant, however, and the plaintiff is compelled to come to this Court to get rid of it, upon reversing the judgment and setting aside the verdict, he cannot have final judgment against the defendant, but must go back and give the defendant another chance before the jury. Upon what principle an appellate court can justify such a discrimination between parties; I am unable to see." Dissenting opinion of Judge Poffenbarger in Ruffner Brothers v. Dutchess Insurance Co., 59 W. Va. 432, 53 S. E. 943 (1905), at page 446.

50 See Federal Rule 41.
to make it available. Hence the fact that the judgment non obstante is rendered at a time when it is too late to seek a reopening of the case may not constitute a very serious objection. On the other hand, if it should happen that the party was, at the time when the motion was made, supplied with such evidence (which presumably he had failed to offer through inadvertence), he could at that time ask to have his case reopened for the purpose of presenting it instead of risking the hazard of a judgment non obstante on insufficient proof. The argument of the motion would usually instruct him as to the deficiency and suggest the remedy. Or, failing to obtain a reopening of the case, he could take a nonsuit.

The basis of the argument that a new trial should be granted in lieu of a judgment non obstante is the supposition that the losing party might be able to produce at the new trial evidence which he did not have available at the first trial. Such a contention is open to various objections. The normal procedure for the purpose of seeking the benefit of newly discovered evidence is a motion for a new trial. If the party against whom the judgment non obstante has been entered has, before the end of the term at which it is entered, discovered new evidence which ought to produce a different result at a new trial, he can ask to have the judgment vacated and move for a new trial on the basis of the newly discovered evidence. Of course this remedy would be available only when the new evidence has been discovered before the end of the term at which the judgment is entered; but, if the discovery is too late, the party against whom a judgment non obstante is entered would be in no more excusable a position than any other party who failed to present grounds for a new trial before the end of the term. After all, even if the utmost liberality were granted, the circumstances of most cases indicate that it would be impossible, or only remotely possible, to make a better case on a retrial. Generally the evidence at the original trial leaves the losing party irretrievably convicted of contributory negligence or faced with some other obstacle which he could not effectually remove by evidence at another trial. In fact, the possibility that an unscrupulous party, in order to bolster an otherwise hopeless case, may attempt to employ illegitimate means to produce additional evidence, or to modify the original evidence, at a new trial has been urged as a reason why a new trial should not be granted.\textsuperscript{51}

Whatever the merits of these various arguments in favor of the judgment *non obstante* based on the evidence, it may seriously be doubted whether the one most frequently and most emphatically urged in its favor — that it will put an end to useless litigation — is not overemphasized. The argument generally seems to assume that, if a new trial is granted in lieu of a judgment *non obstante*, inevitably the new trial must take place, while in fact it seems that this seldom would, or does, occur. In very few, if any, of the numerous West Virginia cases where the supreme court has reversed the trial court because of error in refusing to direct a verdict and remanded the case for a new trial has the case ever gone back to the supreme court. Generally the futility of a new trial is clearly demonstrated by the purport of the supreme court’s opinion. Perhaps it may safely be said that, in the majority of cases, no new trial, but merely a threat of a new trial, takes place by continuing the case on the trial docket after it has been remanded until it has been discontinued or a nonsuit has been taken after a plaintiff has been convinced that the threat is not going to produce a compromise settlement. Such a prolongation of litigation may constitute an unjustifiable nuisance, but it will take little of the court’s time and result in little trouble or expense to any litigant.